No. 15315

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

M. W. ENGLEMAN, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a Corporation,

Appellant,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION and INSURANCE COMPANY OF NORTH AMERICA, a Corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

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Preliminary Statement.

The weakness of appellees' position is illustrated by claims that citation of authority for their contentions would be "trite and presumptuous" (*e. g.* Appellees' Br. p. 11), by admittedly substituting categorical statements for "detailed analysis" (*id.* p. 18) and by failure to cite any authority whatever on the critical issues of this case.

Furthermore, accusing appellant of "torturing" the evidence (Appellees' Br. p. 11), characterizing our argument as an attempt to demonstrate "that cardinal principles no longer exist" (*id.* p. 13), describing an argument based on the authority of decisions by United States Courts of Appeal as a "last struggling effort" (*id.* p. 20) are statements which practically amount to a confession of inability to answer, when placed in a brief which is devoid of authority or logical analysis on the critical issues. Such

statements by appellees do not take the place of authority or reason.

Appellees' "factual" statement demonstrates further weakness; they concede, as they must, that all evidentiary conflicts and inferences must be resolved in appellant's favor (Appellees' Br. pp. 3, 13). Yet, they review the evidence in the light most favorable to themselves and have completely omitted, except for a passing reference, any mention of the significant evidence of custom and usage in the insurance business in the Los Angeles area.

This evidence is of tremendous importance in the case from at least two standpoints: (1) The manner of acceptance of offers for additional insurance was thereby proved. Despite defendant's protestations, the very principles of general contract law which they so solemnly invoke (Appellees' Br. pp. 11-13) are clear on this point; by custom and usage an offeree may make silence his badge of acceptance; in this case the custom was definitely and thoroughly proved. (2) The second significance of custom in this case lies in legislation. By statute in California "[e]ach party to an insurance contract is bound to know . . . [a]ll the general usage of trade" (California Ins. Code 335(b).) The cases hold that this applies equally to the usages of the insurance business.

Appellees have not squarely faced the proved facts of the case; they have preferred to treat appellant's arguments with disdain, rather than to even attempt an answer. Appellees have not, by "categorical" statement (See Appellees' Br. p. 18) or otherwise, distinguished plaintiff's cases; furthermore, they have cited no applicable authority supporting their position on the critical issues involved.

We must assume that appellees' counsel have stated their position as forcefully as it can be stated. Yet their answer amounts to no answer at all.

Appellant is entitled to a reversal of the judgment of dismissal, and is entitled to have the jury consider his case.

ARGUMENT.

Introductory.

Plaintiff-Appellant has made three fundamental arguments:

(1) That "the testimony and all reasonable inferences therefrom must be viewed in the light most favorable to the plaintiff" (Appellant's Op. Br., Pt. I, p. 14); appellees admit that this rule is correct (Appellees' Br. p. 13), although they fail to honor it.

(2) That plaintiff's assignor and defendants entered into a binding preliminary oral contract for increased insurance by means of offer on the part of Campagnola and acceptance by defendants; this argument is made by appellant in three steps (Points II, III and IV of our opening brief):

(a) Binding insurance contracts may be made orally and informally (Appellant's Op. Br., Pt. II, pp. 15-16); appellees admit that this is correct ("This is true . . ." Appellees' Br. p. 13).

(b) An offer to enter into an insurance contract is accepted by silence if custom requires prompt notice of declination in order to avoid being bound (Appellant's Op. Br., Pt. III, pp. 16-18); appellees cite no authority in opposition; instead they make a "categorical" statement (Appellees' Br. pp. 16-18).

(c) The parties to an insurance contract need not discuss or even mention the usual and ordinary terms of an insurance contract, such as premium, duration, date of commencement, etc. These matters have been and will be implied by the courts into the parties' understanding (Appellant's Op. Br., Pt. IV, pp. 18-23). Although Appellees protest (pp. 8, 16-17, of their brief) that lack of express discussion of these items is fatal, *yet they concede (on p. 19 of their brief) that appellant's position is correct.* They

raise a new point: No contract arose because of the failure of Love, the agent, to tell Esposito, Campagnola's president, the name of companies and the amount of insurance, of the $50,000 total, which had been assigned to each. This argument is contrary to a solid body of authority both within and without California.

(3) Appellant claims that Love acted as a dual agent, and his acts and knowledge bound both plaintiff's assignor and the companies. Although this argument has a solid factual basis in the record of this case and a solid legal basis in the decided cases, appellees apparently prefer to spoof it, rather than to answer.

We shall deal with each of appellees' arguments with the framework of our arguments for reversal.

We shall not state as a separate point in this brief the elementary rule that on an appeal such as this, plaintiff is entitled to have the evidence and all inferences therefrom viewed most favorably to him. The point is conceded, although not honored, by appellees.

I.

A Binding Oral Preliminary Insurance Contract for Increased Coverage Was Entered Into Directly Between Defendants and Plaintiff's Assignor.

A. Preliminary Contracts for Increased Insurance Coverage May Be Made Orally and Informally.

Several of the cases standing for this well-established proposition are cited at pages 15-16 of our opening brief. For example, the role of the telephone has received express judicial recognition in California. *Guipre v. Kurt Hitke & Co.*, 109 Cal. App. 2d 7, 15, 240 P. 2d 312, 317 (1952), holding enforcible an oral contract of original insurance which was formed by telephone conversations.

Appellees concede the point: "This is true . . ." (Appellees Br. p. 13).

1. However, appellees argue that such contracts are rare and unusual (pp. 13-14). Appellees seem to imply that the courts should look with a jaundiced eye upon such agreements. Appellees cite such cases as *American Can Co. v. Agricultural Ins. Co.,* 12 Cal. App. 133, 106 Pac. 720, decided in 1909, and *Law v. Northern Assurance Co.,* 165 Cal. 394, 132 Pac. 590, decided in 1913, by a department of the California Supreme Court under the former practice in this state.

The very short answer to the "rare and unusual" argument is that it is no longer true factually or sound legally. As a legal proposition, the very cases and the very language relied upon here by appellees have been disapproved.

In a recent California decision, *Parlier Fruit Co. v. Fireman's Fund Ins. Co.,* 151 A. C. A. 6, 24, 311 P. 2d 62, 74 (1957, reh. den. Hearing by California Supreme Ct. den.) the appellate court expressly disapproves the "rare" and "unusual" rule and expressly disapproves the *American Can* and *Law* cases, which the appellees in this case have cited in their Brief. The Court states unequivocally:

> "While it may have been true that in 1909 and 1913, parol contracts of insurance were rarely made, such statement is no longer true."

Also in *Guipre v. Kurt Hitke & Co.,* 109 Cal. App. 2d 7, 15, 240 P. 2d 312, 317 (1952), the court said:

> "As pointed out by respondent, in modern practice most of the business of the agency insurance company is conducted over the telephone. New insurance in various forms, *as well as increased coverage on existing insurance is commonly ordered by telephone.* . . ."

Accord: *Kazanteno v. Cal. Western etc. Ins. Co.,* 137 Cal. App. 2d 361, 290 P. 2d 332 (1955).

2. Appellees also argue (pp. 11-12) that an insurance contract is a contract which is governed by the rules of law applicable to contracts.

Since we are, in this case, seeking enforcement of contract rights, we agree with appellees that an insurance contract is a contract. If, however, appellees are seeking to imply that there is no body of law which has developed specifically governing insurance contracts, we disagree. Without mentioning the specific insurance texts such as those written by Couch and Appleman, American Jurisprudence devotes 150 pages *exclusively to an examination of the particular rules applicable to insurance contracts* (29 Am. Jur. 141-289), *Corpus Juris* devotes 350 pages (44 C. J. S. 927-1302) to the same subject, and California Jurisprudence devotes 235 pages (27 Cal. Jur. 2d 650-824 to 28 Cal. Jur. 2d 11-72). There is a specific body of law relative to insurance contracts and it governs this case; it calls for reversal and submission of the case to the jury.

3. In their brief appellees set forth a lengthy quotation from Judge Vallée's opinion in *K. C. Working Chemical Co. v. Eureka Security Fire & Marine Ins. Co.,* 82 Cal. App. 2d 120, 185 P. 2d 832 (1947), and seem to imply that that case imposes some sort of barrier to plaintiff's recovery here. The short reply is that the holding of the *Working* case *was favorable to the insured, and the case involved a completely different issue—authority of an agent to cancel existing insurance.* Moreover, there is nothing in Judge Vallée's statement which is in any way contrary to plaintiff's position here. Every statement made by Judge Vallée is met by the proof in this case and the rules of law applicable thereto.

B. The Contract Was Definite and Certain.

Appellee made quite an argument in the court below that there was no contract because the minds of the parties had not met on the various terms of an insurance contract [*e. g.* R. 194-195].

Despite the fact that all the terms were customary and this case involved simply an *increase* in coverage under already existing policies, the trial court accepted the argument and made it the *sole* basis of the judgment of dismissal [*e. g.* R. 198, 204].

We set forth (at pp. 13-18 Op. Br.) the rule relative to ordinary and usual terms of an insurance contract: the courts have repeatedly implied into the understanding between the parties each and every item asserted by defendants here as a fatal deficiency.

Defendants now repeat this argument (pp. 8, 16-17 of their brief) and urge that the contract was fatally defective because Love, the agent, did not tell Esposito (the president of plaintiff's assignor) "when the contract . . . would go into effect" (pp. 8, 17), "how long the insurance would endure" (pp. 8, 17), "the terms or end of it" (*id.* p. 8), "the rate" (pp. 8, 17), or "the loss payees" (*id.* pp. 8, 17); on page 19 of their brief they admit, however, that our argument is correct.

1. As pointed out in our opening brief (pp. 18-23), each of these matters is the subject of customary and usual terms and the parties will be *presumed* to have contracted with reference to these customary and usual terms.

> Couch, 1 *Cyclopedia of Insurance Law,* 124-125, 138-139; 46 C. J. S. 412-413; 29 Am. Jur. 147; 15 A. L. R. 1008-1009; 69 A. L. R. 568; 92 A. L. R. 238, 239; *Maryland Casualty Co. v. Industrial Acc. Commission,* 179 Cal. 716, 721, 178 Pac. 858, 860 (1919).

In *Guipre v. Kurt Hitke & Co.,* 109 Cal. App. 7, 14, 240 P. 2d 312 (1952), the court, in holding the insurance company bound, held:

> "Under section 335, subdivision (b) of the Insurance Code, each party to a contract of insurance is bound to know 'All the general usages of trade.' When

there is a known usage of trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears; and the usage forms a part of the contract. Evidence of usage is always admissible to supply a *deficiency* or as a means of interpretation where it does not alter or vary the terms of the contract. (*Watson Land Co. v. Rio Grande Oil Co.,* 61 Cal. App. 2d 269, 272 [142 P. 2d 940].)" (Emphasis supplied.)

Such is the situation here.

Accord:

Kazanteno v. California-Western etc. Ins. Co., 137 Cal. App. 2d 361, 290 P. 2d 332 (1955);

Stanley v. Columbia Casualty Co., 63 Cal. App. 2d 724, 147 Pac. 682 (1944);

Chase v. National Indemnity Co., 129 Cal. App. 2d 853, 278 P. 2d 68 (1954) (Parole waiver of term of contract; held binding on insurer).

Cases from other jurisdictions, as well as the United States Supreme Court, are in accord.

Eames v. Home Ins. Co., 94 U. S. 621, 627, 629 (1877):

"But it is objected, in the next place, that the contract, if one was made, was not complete and precise in its terms; that it did not state the period of time during which the risk was to continue, and did not state what kind of a policy (of two or three different kinds which the Home Company used) Eames wished to have. It does appear that the application, which was signed on the 13th of October, did not (as is usually done) call for a statement of the period of insurance. It was one of the Company's own printed blanks, and the probability is, that the reason this

item was not inserted was the almost universal practice of taking ordinary insurance against fire for a year. Nothing else seems to have been in the minds of the parties. The former insurance on the property has been for that period. . . . We think it perfectly manifest, from all the evidence taken together, that the parties meant and intended an insurance for a year, and had nothing else in their minds. This is the inference to be drawn from all their conduct, conversations, and correspondence; and we should be sticking in the bark to ignore it.

"The plea, that no time for the continuance of the insurance was stipulated for, is evidently a mere afterthought.

"There is no difficulty as to the time when the risk was to commence. It was the practice of the defendant, as it is of most, if not all, other companies, to antedate the policy to the time of making the application; which, in this case, was on the 12th day of October, 1872. . . .

"As to the plea that the contract does not specify what kind of a policy was desired, it does not appear that the complainants had any knowledge or notice that the defendant issued different kinds of policies. As Eames justly said, he supposed (as he had a right to suppose) that they would get the same kind of policy which had been issued on the property before. *If no preliminary contract would be valid unless it specified minutely the terms to be contained in the policy to be issued, no such contract could ever be made or would ever be of any use.* The very reason for sustaining such contracts is, that the parties may have the benefit of them during that incipient period when the papers are being perfected and transmitted. *It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the*

period, the amount and the rate of insurance is ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it." (Emphasis supplied.)

The Massachusetts Supreme Judicial Court has even gone to the extreme of holding "An oral agreement for insurance is not rendered invalid because more information must be had before a policy can be written." *Shumway v. Home Fire & Marine Ins. Co. of California,* 301 Mass. 391, 395, 17 N. E. 2d 212, 214 (1938). In the instant case, of course, the defendants had been insuring plaintiff's assignor against fire prior to the increase in the insured amount. These defendants needed no more facts.

See also:

15 A. L. R. 1008-1009; 69 A. L. R. 568; 92 A. L. R. 238, 239; *Milwaukee Bedding Co. v. Graebner,* 182 Wisc. 171, 180, 196 N. W. 533, 536-537 (1923); *Michigan Pipe Co. v. North British & Mercantile Ins. Co.,* 97 Mich. 493, 56 N. W. 849 (1893); *Preferred Risk Fire Ins. Co. v. Neet,* 262 Ky. 257, 90 S. W. 2d 39 (1936); *Rommel v. New Brunswick Fire Ins. Co.,* 214 Minn. 251, 8 N. W. 2d 28 (1943); *Elliot v. Standard Accident Ins. Co.,* 92 N. H. 505, 33 A. 2d 562 (1943); *Auston v. New Brunswick Fire Ins. Co.,* 111 Mont. 329, 108 P. 2d 1036 (1941); *Chenier v. Insurance Company of North America,* 72 Wash. 27, 129 Pac. 905, 48 L. R. A. (N. S.) 319 (1913) (renewal).

In Pacific Fire Ins. Co. v. Donald, 148 Tex. 277, 282, 224 S. W. 2d 204, 207 (1949), the court held:

> "There is nothing in the record to indicate that Donald expected any other kind of policy than the usual standard form of policy in use by the insurer at the time. In view of this testimony, the rule stated in the note annotating the cases in connection with the opinion of the Supreme Court of Washington in the case of *Chenier, et al. v. Insurance Company of North America,* 72 Wash. 27, 129 P. 905, 48 L. R. A., N. S. 319, Ann. Cas. 1914D, 649, is applicable. On page 653 of Ann. Cas. 1914D, the rule is stated as follows: 'It is well settled that an oral agreement to insure against fire is presumed to be made in contemplation of a policy containing the terms and conditions in customary use, and impliedly to adopt the same, and it is on this ground that such agreements are sustained as complete and binding contracts.' In support of this rule a long list of decisions and authorities is cited. See also *Connecticut Fire Ins. Co. et al. v. Fields,* Tex. Civ. App., 236 S. W. 790, and *Dalton v. Norwich Union Fire Ins. Soc.,* Tex. Com. App., 213 S. W. 230. And the risk will be regarded as beginning with the completion of the contract, which in this instance was when Moore agreed to insure the hay. *Schubert v. McLain & McLain,* Tex. Civ. App., 27 S. W. 2d 846; *Western National Ins. Co. v. LeClare,* 9 Cir., 163 F. 2d 337; *Potter, et al. v. Phenix Ins. Co.,* C. C., 63 F. 382."

2. As to renewal or modification of a contract already existing between the parties, the problem, as recognized by the Supreme Court in the *Eames* case, is even more easily solved *because all of the terms have already been definitely spelled out between the parties.* The parties are already well aware of the terms. Thus, the courts have had even less difficulty in binding the insurer under such circumstance.

See, *e. g.*:

Green v. Liverpool & London & Globe Ins. Co., 91 Ia. 615, 60 N. W. 189 (1894);

Milwaukee Bedding Co. v. Graebner, 182 Wisc. 171, 180, 196 N. W. 533, 536-537 (1923);

Michigan Pipe Co. v. North British & Mercantile Ins. Co., 97 Mich. 493, 56 N. W. 849 (1893).

3. The matter of the amount of premium is discussed in the cases cited above. However, because it was of particular interest to the trial judge, and is now stressed by appellees, we point out that the testimony is uncontradicted that all insurance companies charge the same rate [R. 149-150]. This fact is well understood. It has been judicially noticed by several courts.

See, *e. g., Preferred Risk Fire Ins. Co. v. Neet,* 262 Ky. 257, 262-263, 90 S. W. 2d 39, 40 (1935), in which the court said:

> "As to the premium: Since fire insurance rates in any particular community and on specific property are known to be uniform and standard, *the law implies a promise to pay whatever premium is so chargeable.*" (Emphasis supplied.)

In Appleman, 12 *Insurance Law and Practice* 275, it is said:

> "Where an oral agreement to insure is entered into, without specifying the premium rate, it is a contract to insure at the customary rates."

The law is clear. The usual, ordinary and customary terms of a fire insurance contract, including the premium, the effective date, the duration and all other usual and ordinary terms will be implied into the oral understanding. They will be *presumed* to have existed.

4. *In addition to this impressive collection of authorities, there is a very recent California case in which one*

of the present appellees, Insurance Company of North America, was also a party, which holds squarely in accord with appellant's contentions: Parlier Fruit Co. v. Fireman's Fund Ins. Co., et al., 151 A. C. A. 6, 18-25, 311 P. 2d 62, 69-76 (1957).

In that case one Rebholtz was general agent for all seven of the defendant insurance companies (one of which is an appellee in the instant case), just as Klee was the general agent for both defendants in this case; Babish, who was not a general agent, worked for Rebholtz and handled all of the insured's business, much as Love did for Campagnola in this case. About two months before a fire on the insured's premises, Babish spoke to the insured's president about use and occupancy fire insurance. Nine days before the fire Babish told the president that he didn't know which form of such insurance would be best for plaintiff. Five types of coverage were written by the companies. At that time Babish and the president agreed upon $100,000, later reduced to $75,000. That was the sole element discussed, just as here only the amount of $50,000 increased insurance was specifically stated. After one insurance company declined to write the full amount, Babish wrote the six other companies requesting the coverage, dividing the amounts between them, without telling plaintiff or its agents how the amounts were being split up. *The court in the Parlier case held the companies bound to the coverage.*

Although the companies wrote five different types of use and occupancy insurance, the court implied into the agreement the understanding that the companies knew they were binding plaintiff for the kind of insurance best suited to plaintiff's needs (151 A. C. A. 6, 20-21). The period of the preliminary insurance was also implied (*id.* pp. 21-22). The percentage of coverage was not specifically agreed upon. The court implied that it would be a reasonable percentage (*id.* p. 21).

No premium rate was discussed. The court held:

> "*Rate.* The premium rate would necessarily be the company's rate for the coverage received. There is implied an agreement to pay the usual premium (44 C. J. S. 959)."

Thus, California is squarely in accord with the general authorities. Furthermore, it should be pointed out that despite the appellees' protestations (pp. 8, 16-17 of appellees' brief) as to the deficiencies, appellees (on p. 19) apparently concede, as they must, that our argument is correct ("We can agree with this . . .").

5. Appellees also contend that plaintiff's case must fail because Love did not tell Esposito what companies would be used or what amounts of the $50,000 total would be allocated to them (Appellees' Br. pp. 8, 16-17, 19).

This argument is opposed by overwhelming authority. *Plaintiff's position has been accepted in the very recent California decision which specifically rejects appellees' contention.* In the *Parlier* case, *supra,* 151 A. C. A. 6, 311 P. 2d 62 (1957), the plaintiff president simply told Babish that he wanted $75,000 worth of use and occupancy insurance. There was no discussion as to names of companies nor was the discussion of division of the total amount between them. Babish designated the companies and the amounts prior to the fire just as Love did here. *The court held the companies bound in the amounts designated:*

> "Here, plaintiff expressly agreed to accept a total insurance amount up to $75,000 *and impliedly agreed to accept from each company the amount allocated to it by Babish* (the agent's employer), provided only that the total from all companies did not exceed $75,000. Each defendant agreed to coverage in a particular sum. All the elements required to make a binding contract were present." (*Id.* p. 22.)

The court specifically approved and quoted from (*id.* p. 23) the holding in *Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Engineering Co.,* 177 F. 2d 305, 309-310 (7th Cir. 1949), where the court held:

> "It is said that the parties' minds did not meet upon the names of the companies to be bound. We think this wholly immaterial under the facts and circumstances of record. When the agent represents several companies and selects certain of them to be bound by the risk, he is contracting for undisclosed principles. Each of the companies he represents has intrusted him with the agency, and must be held to have given authority as such agent to select it as the one to bear the risk. Such authority springs inevitably from his authority to make insurance contracts. The insured cannot be permitted to suffer because the agent fails to disclose at the time of making the contract which of several principals he binds. *Aetna Insurance Company of Hartford, Conn. v. Licking Valley Milling Co.,* 6 Cir., 19 F. 2d 177; *Elliott v. Standard Accident Insurance Company,* 92 N. H. 505, 33 A. 2d 562; *Milwaukee Bedding Co. v. Graebner,* 182 Wisc. 171, 196 N. W. 533; *Federal Insurance Co. of Hartford, Conn. v. Sydeman,* 82 N. H. 482, 136 A. 136; *Fire Insurance Company of Philadelphia County v. Sinsabaugh,* 101 Ill. App. 55."

In *Milwaukee Bedding Co. v. Graebner,* 182 Wisc. 171, 181, 196 N. W. 533, 536, 537 (1923), the court said:

> "In such case the agent becomes the agent of the insured for the purpose of selecting the company."

Rommel v. New Brunswick Fire Ins. Co., 214 Minn. 251, 263-264, 8 N. W. 2d 28, 35 (1943);

Elliott v. Standard Accident Ins. Co., 92 N. H. 505, 511-512, 33 A. 2d 562, 567 (1943);

12 Appleman, *Insurance Law & Practice* 286.

In California, in the Federal Courts, and throughout the United States, the rule is well established.

Moreover, in the instant case it was clearly proved that Love did in fact, prior to the fire of August 7, 1954, designate the companies to take the $50,000 increase. He prepared the memoranda on August 1, 1954. He mailed the memoranda to each of the defendants on August 2, 1954 [R. 151-153]. The companies received the memoranda [R. 151]. He allocated the additional insurance in a very definite manner: $14,000 was allocated to General Accident [R. 153]. $15,000 was allocated to North American [R. 158]. $21,000 was allocated to a third company and is not the subject of litigation [R. 158].

Under the authorities, Love's designation of the insurers was binding upon the companies.

Furthermore, under the proved facts, it was clear that plaintiff's assignor *already* had fire insurance with the defendants. It is a reasonable inference that when Esposito requested additional insurance [R. 149], he intended that the same companies be used. (See, *Western Nat. Ins. Co. v. LeClare,* 163 F. 2d 337, 340 (9th Cir. 1947).)

Appellees' argument, which cites no authority, is incorrect. The insurers having been designated prior to the loss, the contract was binding.

C. The Contract Was Accepted by Defendants. They Failed to Promptly Decline the Risk in the Face of a Custom Which Required Them to Do so if They Did Not Wish to Be Bound.

The evidence and the law on this point are both clear. Love testified that when a request for coverage is made, if a company wishes to decline, it must do so "at once." The uncontradicted evidence is that silence in *the face of this custom indicates acceptance of the requested coverage* [R. 155-156]. Love testified that if a company did

not wish to be bound "they *at once* notify you with a telephone call, followed by a written letter of declination" [R. 156].

Love's conversation with Esposito took place on Friday, July 30, 1954. Esposito told Love, "Dick, go ahead and place that other $50,000 of fire insurance which we discussed some time ago" [R. 149]. On the next working day, Monday, August 2, 1954, Love mailed the memoranda to the companies.[1] The fire occurred in the evening of the *following Saturday,* August 7, 1954. No communication was received from either defendant between Monday, August 2, 1954 and the time of the fire.

The legal propositions on which plaintiff relies are well established.

1. As a matter of insurance law, if custom requires an insurer to decline a risk solicited by its agent or subagent and communicated to it, failure to promptly[2] decline creates a binding insurance contract.

> "So, it has been said that where there is a general usage or custom to the effect that persons authorized to solicit insurance can bind their principals until it has rejected the risk and so notified the agent, who, in turn notifies the applicant, such a parol contract is valid and binding."
>
> 2 Couch, *Cyclopedia of Insurance Law* 1583; *Brown v. Franklin Mutual Fire Ins. Co.,* 165 Mass. 565,

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[1]There is no evidence as to the time of day on Friday, July 30, 1954 when the conversation took place. The evidence as to the time of mailing of the memoranda is in the record: they were mailed prior to 10:00 A. M. the following Monday. Appellees' statement that "Mr. Love did not immediately make any effort to place this insurance. . . ." (Appellees' Br. p. 8) is but a demonstration of appellees continual resolution of factual inferences in their own favor.

[2]The custom applicable in this case required coverage to be declined "at once" [R. 156].

43 N. E. 512; *Hallauer v. Fire Assn. of Philadelphia,* 83 W. Va. 401, 98 S. E. 441; *Cf. Grange Mutual Fire Ins. Co. v. Commons, Inc.,* 146 F. 2d 788 (1st Cir. 1945); *Muntz v. Travelers Mutual Casualty Co.,* 229 Ia. 1015, 295 N. W. 837; *Bituminous Casualty Corp. v. Baldwin,* 196 Va. 1020, 86 S. E. 2d 836.

Appellees refuse to make a "detailed analysis of these cases" (Appelleees' Br. p. 18). Rather, they "state categorically" that they apply only to cases where an agent has actual or ostensible authority and enters into a "completed contract" (*id.* p. 8).

Our reply may be briefly made. The proof here is of authority to bind the appellees by means of subagency of Love, acquiesced and concurred in by these insurance companies for a considerable period of time [See our Statement of Facts, Op. Br. pp. 5-6; R. 101-104, 135-138]. *The trial judge specifically held that plaintiff had made out his case on the subagency issue* [R. 197-198, 204, 208]. It is, of course, hornbook law that a subagent may bind the principal just as the agent may.

1 *Restatement of the Law of Agency,* Sec. 142(b), p. 367, states:

> "As far as the contractual relations between the principal and third persons are concerned, a subagent has the same power as an agent."

California Civil Code, Sec. 2351:

> "A subagent . . . represents the principal in like manner with the original agent."

Accord:

2 Cal. Jur. 2d 722.

The general rules of agency law apply to insurance companies and their agents.

> *Frasch v. Londen & Lancashire Fire Ins. Co.,* 213 Cal. 219, 223, 2 P. 2d 147 (1931);
>
> *Snyder v. Redding Motors,* 131 Cal. App. 2d 416, 421, 280 P. 2d 811 (1955).

As to the second part of their "categorical statement," we submit that appellees are incorrect and that the cases cited support our position, not theirs. There would be no need for the rule if it applied only to "completed" contracts; the contract would be binding at that point and the rule would never have come into existence.

2. Aside from these special rules in insurance cases, the general principles of contract law, so solemnly invoked by appellees, are quite clear on this point.

An offeree may, by custom and usage, make silence his badge of acceptance. *Here the evidence and the reasonable inferences therefrom is that, in August of 1954, in the Los Angeles area, if an insurer did not wish to be bound on the terms of its agent's memorandum, it declined at once by telephone and then wrote a letter of declination.* Love received no communications either oral or written prior to the fire.

The general contract principle is stated by Williston thusly:

> "The offeree may authorize the offeror to regard silence as an acceptance of his offer. Such authorization is not likely to be given in express terms, but the conduct of the offeree in previous dealings . . . may have justified the offeror in understanding silence as assent. If he does so understand there is a contract. . . .
>
> *"Evidence of usage in a particular trade has been held admissible with other circumstances to prove assent a justifiable inference from silence.*

"A further extension of this doctrine is developing in the cases,—that, *where an offeree solicits the offer* [as occurred in this case], this, in the light of the relations of the parties or other surrounding circumstances, may justify the offeror as a reasonable man in interpreting the offeree's silence after receiving the offer as acceptance."

1 Williston on Contracts, 286-288.

In *Truscon Steel Co. v. Cooke,* 98 F. 2d 905, 911 (10th Cir. 1938), quoting from *Laredo Nat. Bank v. Gordon,* 61 F. 2d 906, 907 (5th Cir. 1932), the court held:

"[W]here the relation between the parties is such that the offeror is justified in expecting a reply, or the offeree is under a duty to reply, the latter's silence will be regarded as acceptance. Under such circumstances, 'one who keeps silent, knowing that his silence will be misinterpreted, should not be allowed to deny the natural interpretation of his conduct,' etc."

In 12 Cal. Jur. 2d 214, it is said:

"Whenever the relation between the parties is such that the offeror is justified in expecting a reply, or the offeree is under a duty to reply, the latter's silence will be regarded as acceptance."

3. The evidence in this case showed that the companies customarily (in the absence of specific contrary instructions) dated enforcement of a new policy or a change in an old one from the date of the agent's memorandum, regardless of when they actually wrote the policy. *Moreover, the companies customarily charged their premiums from the date of agents' memorandum* [R. 160-162].

In the recent California case, *Parlier Fruit Co. v. Fireman's Fund Ins. Co.,* 151 A. C. A. 6, 20-21, 311 P. 2d 62, 72 (1957), where similar facts were proved, the court

held that the insurer was bound and that to hold otherwise would be to sanction a fraud:

> "To hold otherwise would mean that parol binders although recognized by law to be valid, are only valid if the insurance company wants to consider them so. Thus, when the permanent policy is issued and the insured charged a premium for the period covered in the binder, a fraud would be consummated, as the insured would be charged the back premium, even though he really had no protection during the period charged for."

Defendant companies were silent here for almost a week in face of a custom that required prompt action. If there had been no fire they would have charged their premium from the date of the agent's memorandum [R. 160-162]. To permit them to deny coverage would be tantamount to permitting a fraud. Neither the California courts, nor any others, courts of which we are aware have allowed the insurer to escape liability under such facts.

Moreover, Love, as agent of plaintiff's assignor, when he received no communication from the defendants, relied on these customs and assumed the companies by their silence had indicated that they were bound. He, therefore, made no effort to place the insurance elsewhere [R. 189-191]. The companies should not be now permitted to deny the coverage.

4. At several points in their brief defendants attempt to characterize the memoranda sent by Love to the insurance companies as "mere inquiries" (Appellees' Br. *e. g.* pp. 11, 17). This is but another illustration of appellees' error in resolving all factual inferences in their own favor.

The memoranda which were sent and which were received by the defendants [R. 151] were the usual method of obtaining insurance for a client. While phrased as re-

quests, the memoranda contained no question marks. The testimony was quite clear that memoranda such as these were all that the companies customarily required as a basis for a preliminary contract of insurance and for writing the final policy or issuing a modification. The companies customarily dated their formal documents as of the date of the agent's memoranda [R. 160-162]. *They had followed this custom in dealing with plaintiff's assignor in the past* [R. 161].

Moreover, the companies customarily charged the premium from the date of the agent's order [R. 161-162]; it avails appellees nothing to call the memoranda "mere inquiries"; the companies themselves customarily regarded them as a great deal more, and plaintiff's assignor was made aware of this practice by these very defendants.

The companies were bound. They were bound (1) under rules specifically relating to insurance contracts, (2) under the ordinary rules of contract law, and (3) under their own practice. They dated their policies and modifications, charged premiums *from the date of the agent's memoranda*. The defendants should not be permitted to escape liability by characterizing as "mere inquiries" the memoranda upon which they customarily considered themselves bound. To permit the insurance companies to thus escape liability would be, in the words of the California courts, to permit consummation of a fraud (*Parlier Fruit Co. v. Fireman's Fund Ins. Co.,* 151 A. C. A. 6, 20-21, 311 P. 2d 62, 72 (1957)).

II.

Love Acted as Agent for Both the Insured and the Defendants and Had Actual Knowledge of All the Terms and Conditions of the Insurance Contract.

The trial judge rendered judgment of dismissal because plaintiff had, in his opinion, failed to spell out agreement between the parties on the various minutiae of the contract for increased insurance [R. 204, 208]. He did not base his judgment on any supposed failure of the companies to accept whatever had been offered, and he specifically stated that plaintiff had made out a jury case on the agency issue [R. 197-198, 204, 208].

It was the supposed failure of plaintiff to prove, in the judge's words "What was offered? What was accepted?" [R. 204], that resulted in this judgment.

We have heretofore cited the applicable authorities on implying into the agreement the usual and customary terms of the contract. We have pointed out that in a very recent California case the *trial* judge took exactly the same position as Judge Tolin did here. He was reversed. The appellate court ruled that it would imply the usual and customary elements into the contract. *Parlier Fruit Co. v. Fireman's Fund Ins. Co.,* 151 A. C. A. 6, 311 P. 2d 62 (1957). This line of authority alone requires reversal.

But reversal is also required on the basis of Love's dual agency. As the cases cited in the opening brief demonstrate, Love represented both the insurance companies and the insured. Love's knowledge of the usual and customary terms of the contract for increased coverage was proved. This knowledge is, on ordinary agency principles, imputed to his principal; thus no ground for asserting indefiniteness exists; Love knew exactly what the terms of the contract were.

Appellees call the argument a "last struggling effort"; they cite no cases in opposition.

It was proved that Love acted in this case as an agent in a dual capacity, and that this is customary in the fire insurance field [R. 181, 191-192].

The cases (at pp. 25-26 of our opening brief) abundantly sustain the proposition that it is customary in fire insurance for the same agent to represent both insured and insurer.

As stated in *Home Ins. Co. v. Campbell,* 79 F. 2d 588, 590 (4th Cir. 1935):

> "It will be noted that in the transactions relating to the insurance both before and after the fire, Mauney was acting in the dual capacity of policy writing agent for The Home Insurance Company and also as agent for the insured. This is very customary in fire insurance practice and is legally unobjectionable where the agent acts in entire good faith and with due authority from both principals. . . ."

Appellees seek to avoid the effect of those cases and the rule which they announce by (1) calling it a "remarkable theory," (2) saying that it applies only where "a party was permitted to act as agent for both parties with the full knowledge and consent of both" and his position was not inconsistent, and (3) arguing that Love was not an agent of either appellee.

Reply may be briefly made.

1. The theory is not "remarkable." Our research discloses wide acceptance by the courts. The court's attention is directed to the cases cited in our opening brief (pp. 25-26) and the failure of appellees to cite any authority in opposition. Moreover, it was proved in this case that the dual agency was customary and that it actually existed.

2. The cases stand for the proposition that an agent's dual capacity in the fire insurance field is usual and customary. It is unobjectionable: consent is implied unless some adversity of interest is shown and none was shown in the instant case. Appellees attempted "distinction" is thus totally ineffective.

3. The argument that Love was not an agent at all overlooks all of the evidence as to the subagency and the defendants continual, knowing, acceptance of insurance obtained by Love and written through Klee's agency. That this agency was proved sufficiently for submission to the jury was explicitly held by the trial judge [R. 197-198, 204, 208].

Without restating all of the evidence which supports the trial judge's conclusion on this point, the following facts should be sufficient to refute appellees' contention that "Love was not even an agent for either of the appellees" (Appellees' Br. p. 20).

At all pertinent times Love was an "insurance agent" [R. 141]. Commencing in 1950, Love was a general agent for defendant General Accident [R. 143; Pltf. Ex. 6]. There is no evidence that plaintiff's assignor was ever notified of the termination of Love's general agency for General Accident. Love's name appears, pursuant to authority, on the original fire insurance policy issued by General Accident to Campagnola [R. 144-145; Pltf. Ex. 6].

After Love's general agency for General Accident terminated, Love continued to handle all of his existing business with General Accident through Kenneth H. Klee, who at all relevant times was a formally appointed general agent for both General Accident and North American [R. 147-148, 172, 84-93; Pltf. Exs. 1, 2].

Love also transacted business with North American through Klee [R. 136-138]. Love testified:

> "A. In many instances I submit my business to Mr. Klee with—*or submit it directly under his name with his authorization.*
>
> Q. *You mean submit it directly under his name, with his authorization, to companies that he represents?* A. *That is correct.*" (Emphasis supplied.)

Love had, as agent for General Accident, obtained for Campagnola a written policy for $11,000 [R. 145], which he renewed through Klee [R. 180]. Acting through Klee, Love, in 1953, obtained the North American $14,000 policy [R. 144-145, 148].

Furthermore it was shown that the procedure of Love's handling business through Klee's name was acquiesced in by both Klee and the two defendant insurance companies; their records reflected that Love was placing business with them through Klee [R. 101-104, 135-138].

As pointed out previously, the acts and knowledge of a subagent bind his principal in the same manner as if he were an agent.

> 1 *Restatement of the Law of Agency,* Sec. 142(b), p. 367;
>
> *California Civil Code,* Sec. 2351;
>
> 2 Cal. Jur. 2d 722.

This dual agency, well-established in this case both legally and factually, supplies an alternative ground for reversal.

The learned and courteous trial judge based his dismissal on the failure of the minds of the parties to meet on the terms of the contract. This was, we submit, error—an error identical to that made by the trial judge in the very recent *Parlier* case, 151 A. C. A. 6, 311 P. 2d 62

(1957), and which resulted in reversal there. This court should follow the state law as announced in the *Parlier* case. Here the judgment of dismissal may be reversed by the court either on the theory widely adopted throughout the United States and recently reaffirmed by the California court in the *Parlier* case: A court will imply into the understanding of the parties the usual and ordinary terms of an insurance contract and will not permit the reasonable expectations of reasonable businessmen to be defeated by disclaimers of liability which arrive after the fire. Or the court may reverse on the theory of dual agency: the agent, representing both parties, knew all of the terms of the contract.

Conclusion.

Appellees have submitted a brief which does not meet appellant's arguments. The propositions of law and fact urged in our opening brief remain unanswered.

Appellees urged one new proposition in their brief: There was no contract because Love never told plaintiff's assignor what insurance companies were designated or what amounts assigned to them. That contention is squarely met herein. The evidence is uncontradicted that Love designated the companies and the amounts some five days prior to the fire. Under the authorities previously cited, this action by the agent obviates all objection based on non-designation.

In conclusion it should be pointed out that appellees' refusal to even state the evidence as to custom and usage shows the inherent weakness in their position. Their argument that custom and usage cannot create a contract is not applicable to this case.

Custom and usage may be and have been used to provide the unexpressed elements on which the minds of the parties have met and to prove the customary method of accepting offers. Plaintiff here seeks to have such evidence

used in this manner. As stated by a recent California insurance decision:

> "Evidence of usage is always admissible *to supply a deficiency or* as a means of interpretation where it does not alter or vary the terms of the contract."
>
> *Guipre v. Kurt Hitke & Co.,* 109 Cal. App. 2d 7, 14, 240 P. 2d 312 (1952).

The many cases relied upon by appellants from *Eames v. Home Ins. Co.,* 94 U. S. 621, 24 L. Ed. 298 (1877), to the *Parlier* case, 151 A. C. A. 6, 311 P. 2d 62 (1957), have relied on such evidence of custom and usage and have implied the usual and ordinary terms of an insurance contract into the agreement between the parties.

We submit that plaintiff is entitled to have his case go to the jury. The judgment should be reversed.

Respectfully submitted,

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